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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1932

NORWEGIAN NITROGEN PRODUCTS COMPANY,
PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the United States Customs Court (R. 37–61) are reported as T. D. 44824, 59 Treas. Dec. 921. The opinion of the United States Court of Customs and Patent Appeals (R. 200) is reported as T. D. 45674.

The opinion of this Court in *United States ex rel. Norwegian Nitrogen Products Company, Inc.,* v. *United States Tariff Commission,* which involved the investigation which is at issue in this case, is reported in 274 U. S. 106. The opinion of the Supreme Court of the District of Columbia in that

case is unreported. It is printed as Appendix C to this brief, *infra,* pp. 78–94. The opinion of the Court of Appeals of the District of Columbia is reported in 6 F. (2d) 491.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was rendered May 2, 1932. (R. 213.) A certificate of importance had been filed by the Attorney General with that court before it rendered its decision. (R. 199.) The company petitioned for certiorari on August 1, and that petition was granted October 17, 1932. (R. 215.) The jurisdiction of this Court rests upon section 195 of the Judicial Code as amended by the Act of February 13, 1925. (U. S. C., Title 28, sec. 308.)

QUESTION PRESENTED

After an investigation by the Tariff Commission, President Coolidge proclaimed an increase in the duty on sodium nitrite. The petitioner contests assessments of duty at the higher rate, contending that during the investigation the Commission did not accord an adequate hearing to the petitioner.

The only substantial question is whether under the law and under the facts of this particular investigation the petitioner was entitled to have access to information concerning the costs of operation of petitioner's business rivals acquired by the Tariff Commission from inspection of private books under

a rule and pledge that the information should not be made public. The petitioner was obviously given ample opportunity to present its own case.

STATUTES INVOLVED

The pertinent provisions of the Act of September 21, 1922, and of the Act of September 8, 1916, are set forth in Appendix A, *infra,* pp. 35–40.

STATEMENT

The petitioner is the exclusive agent within the United States of a Norwegian company which is the leading exporter of sodium nitrite to this country. (R. 145, 171, 197.) It contends that in 1923 when the Tariff Commission, acting under the flexible-tariff provisions of the Tariff Act of 1922, investigated the domestic and foreign costs of producing that commodity it did not give to the petitioner such a hearing as was required by statute and that therefore the subsequent proclamation by President Coolidge increasing the duty on sodium nitrite from 3 to 4½ cents per pound was invalid.

In October, 1922, the American Nitrogen Products Company submitted to the Tariff Commission a request for a report and recommendation to the President that the duty on sodium nitrite be increased 50 per cent, setting forth that its plant was closed because it was unable to meet foreign competition. (R. 160–163, and repeated in R. 165–167.) The Commission on March 27, 1923, ordered that an investigation be made, declared that a

public hearing would be given at some date to be fixed thereafter, and gave public notice of this order. (R. 68.)

The Commission then made an investigation. (R. 164.) The Norwegian company refused to give to investigators of the Tariff Commission access to its cost records relating to sodium nitrite, and it was necessary to obtain from other sources the information as to production costs in that country. (R. 172.) American costs of production were secured from two or three companies. (R. 171, Appendix B, pp. 53, 54.) This information was treated by the Commission as confidential because domestic manufacturers claimed that their costs were "trade secrets" within the meaning of section 708 of the Revenue Act of 1916. (R. 171, 172.)

On July 20, 1923, the Commission gave public notice that on September 10 all parties interested would be given an opportunity to appear before the Commission, to produce evidence and to be heard with regard to differences in the costs of producing sodium nitrite. (R. 69.)

On September 10 (R. 82–146) the petitioner appeared and asked for a complete copy of the request for an increase of rates, with all of the data set forth therein (R. 85). The president of the American Nitrogen Products Company protested that the Commission had promised that confidential information would be treated as such, and the chairman of the Commission assured him that the

Commission would keep that promise. (R. 85, 131.) This president was examined at length. So far as appears, he had already given to the investigators for the Commission all of the information which was referred to at the hearing. (See R. 94, 103, 129, 135.) The witness, however, declined to state publicly his costs of labor, power or material, on the ground that it was competitive information, which had been theretofore furnished to the Commission but which he did not care to disclose to competitors. (R. 138.) The petitioner did not wish to present any testimony. (R. 142.)

On September 15 the Commission made public a report or summary of information secured by it. (R. 70, 163.)

On September 24 the chairman of the Tariff Commission wrote to counsel for the petitioner that (R. 176)

> The Commission is informed that the American Nitrogen Products Company, the applicant in this case, agrees to disclose its cost of production data if the opposition, the Norwegian Nitrogen Products Company, will furnish cost data for the Norwegian product. So far as the Commission is informed up to the present time this offer has not been accepted.

On September 26 another hearing, of which notice had been given on September 10 (R. 146), was held. The petitioner asked for a further extension of time but was unwilling to promise to furnish at

that time the definite figures of cost in Norway. (R. 73.) The Commission (R. 76) ruled that—

> according to the statute, the issue in this case is the difference in the cost of production. As counsel for one of the parties, you knew months ago that the issue would depend upon or turn upon the difference in cost of production. The Commission will rule that in its opinion you have had ample time to prepare a statement of costs of production for your clients and meet the issue at the hearing before the Commission, and will decline the request for a further extension of time for hearings in this case.

It later extended to October 4 (R. 78) and then to October 6 (R. 81) the time in which the petitioner might present its case.

On October 2 (R. 185) the Commission transmitted to the petitioner's counsel its rulings refusing to allow him to inspect the data collected by investigators for the Commission or to cross-examine such men as to cost data but allowing him to present evidence concerning costs of production in the United States. (R. 147–149; repeated R. 186–187.) On October 6 the petitioner was given until the following Tuesday the opportunity to file a brief which might include documentary evidence. (R. 158–159.) At the same hearing petitioner's counsel when asked whether he intended to offer any testimony responded—

> No. All the information which I shall offer to the Commission will be printed as a part of the brief. (R. 152.)

That such a brief was filed may be inferred. (See Appendix, *infra*, p. 69.)

On December 12, 1923, the petitioner applied to the Supreme Court of the District of Columbia for a writ of mandamus directing the Commission to disclose the information sought. The Commission filed an answer which is printed as Appendix B to this brief (p. 41) not in order to establish any fact recited therein which is not supported by the evidence in the record of the case at bar, but as the Commission's unanimous statement of its position with reference to the issues here presented, which are the same as those presented in the prior suit. The petition was dismissed on April 18, 1924, with a memorandum opinion which is printed as Appendix C to this brief (p. 78). An appeal was taken to the Court of Appeals of the District of Columbia. There was no order restraining further action by the Commission and the Supreme Court of the District of Columbia had decided in its favor. While the appeal was pending the Commission made a report to the President, and on May 6, 1924, he proclaimed an increase of duty. (R. 196.) The question of a further hearing before the Tariff Commission thus became moot, and the Court of Appeals so decided on April 6, 1925, 6 F. (2d) 491, but at the same time declared that the petitioner had been entitled to learn from the Commission all information received by it, however confidentially, which did not come within its

definition of trade secrets. On error this Court remanded the case with directions to dismiss the petition as moot. *United States ex rel. Norwegian Nitrogen Products Company, Inc.*, v. *United States Tariff Commission*, 274 U. S. 106.

It will be noted that the American company had stated that an increase in the rate of duty was necessary in order to enable it to compete successfully with foreign producers; that in March, 1923, the Commission gave public notice that an investigation was being undertaken; that a careful study of available sources of information was made by the experts of the Commission; and that the petitioner was given ample opportunity to present facts concerning its own principal and any other relevant evidence or information. Such evidence as the petitioner desired to present was received and considered. Information regarding costs of production obtained by the Commission through the inspection of private books was not disclosed to petitioner. The refusal to disclose this information is sought to be made the basis for the contention that the Presidential proclamation was void.

After the President had in May, 1924, proclaimed an increase in the duty on sodium nitrite, the petitioner made further importations of that commodity, and on February 24, 1925 (R. 7), and September 9, 1925 (R. 8), it filed protests against assessments of duty at the rate fixed by the President, claiming that the increase in duty by him was

invalid, upon the ground that the Tariff Commission had not given to parties interested reasonable opportunity either to be present or to be heard (R. 10), and that the President had not made any independent investigation of the subject (R. 11). The Customs Court, one judge dissenting, overruled these protests. (R. 37–62.) This judgment was affirmed, without dissent, by the Court of Customs and Patent Appeals. (R. 200–214.)

SUMMARY OF ARGUMENT

The only question which is involved in this case is whether the Commission denied to the petitioner a reasonable hearing when it refused to disclose the data which it treated as confidential.

The petitioner was not entitled to that information. The investigation was not judicial in character. It was made in order to assist the President in adjusting the flexible tariff. The Commission was not determining existing rights of parties. It was not an arbiter in a contest in which each contestant was entitled to see all of the evidence. The Commission itself sought for the facts through its own experts and its public hearings were merely parts of a broader investigation. Such an inquiry need not be conducted in the same manner and with the same limitations as a judicial inquiry.

The character of tariff investigations before the enactment of the 1922 law and the legislative history of section 315 show that while that section

included a provision that the Commission should "give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard," Congress did not intend to confine the Commission to public hearings for the ascertainment of facts.

Comparison with other statutes and with other provisions of the Tariff Act of 1922 does not support the contention that the Commission was required to disclose the operations of individual manufacturers.

No statute, Executive Order, or regulation of the Commission required the disclosure of the information which was here treated as confidential.

ARGUMENT

I

THE ONLY QUESTION WHICH IS INVOLVED IN THIS CASE IS WHETHER THE COMMISSION DENIED TO THE PETITIONER A REASONABLE HEARING WHEN IT REFUSED TO DISCLOSE THE DATA WHICH IT TREATED AS CONFIDENTIAL

The petitioner was given abundant opportunity to prepare and present its own case. Public notice of the investigation was given in March. Special agents of the Commission called upon the petitioner's principal for information. Public notice of the hearing was given in July. The petitioner was given opportunity to present testimony on September 10 and on September 26; and it was allowed to file data and argument on October 9.

The petitioner can not fairly complain that it was not given sufficient opportunity to lay before the Commission everything which it considered relevant.

The petitioner, however, points out that the Tariff Act of 1922 granted to it a right to a reasonable hearing and contends that this right included disclosure of the data presented by other parties. Its own foreign principal refused to disclose its costs of production even in confidence and was unwilling to disclose such data even upon condition that the American Company would do likewise. (R. 176.) And yet the petitioner claims that because the Commission refused to reveal American costs which had been given to it in confidence and refused to allow the petitioner to examine the agents who had secured such data, the Commission denied to the petitioner the hearing which was allowed by statute.

The case, therefore, turns upon the question whether such disclosure was an essential part of the hearing which was granted by the Tariff Act of 1922. That act (Act of September 21, 1922, c. 356, sec. 315 (c), par. 2, 42 Stat. 858, 943, U. S. C., Title 19, sec. 156) provided that

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this sec-

> tion until such investigation shall have been made. The Commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The Commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

II

AN INVESTIGATION BY THE COMMISSION UNDER SECTION 315 OF THE TARIFF ACT OF 1922 WAS NOT JUDICIAL OR QUASI-JUDICIAL IN CHARACTER. IT WAS NOT NECESSARY TO CONDUCT IT LIKE A JUDICIAL PROCEEDING

The Commission's investigation was for the purpose of assisting the President to establish a tariff rate which would apply only to the future and which would apply alike to all persons importing sodium nitrite into the United States. It was not conducted in order to enable the Commission or the President to decide what were the existing rights of individuals.

Such a proceeding was not judicial in character. As this Court said in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, a case involving railroad rates:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. * * * Legislation on the other hand looks to the future and changes existing conditions by making a new rule to

> be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind, * * *

In *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 8, the Court further discussed this point, saying that—

> the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power.

See also *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298, 308; *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428, 440. When a commission studies facts in order to assist the President in deciding what specific tariff rates he should ordain prospectively, its investigation is not judicial in character.

Nor is the investigation quasi-judicial. The rate of duty ultimately proclaimed by the President applies to all importers. His decision establishing it is unlike the adjudication of a controversy between individuals. It is unlike the adjudication of facts peculiar to a particular producer or importer. It is not like the valuation of a railroad,

such as was involved in *United States ex rel. St. Louis S. W. Ry. Co.* v. *Interstate Commerce Commission,* 264 U. S. 64, 78, nor is it like the changing of the rates charged by a particular railroad company upon the ground that that company has charged unreasonable rates, a problem which was involved in *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88. It neither determines nor affects the rights of any particular individual or corporation. Legislative in character the investigation is not surrounded by the requirement of due process, and in the absence of statute no one would be entitled to a hearing either before the Commission or the President. Congress may name any rate of tariff it wishes, *Buttfield* v. *Stranahan,* 192 U. S. 470, or it may authorize the President to carry out its policy declared in the statute. *Hampton & Co.* v. *United States,* 276 U. S. 394. Whichever method is followed the result is the determination of the lawful rate. In this process the individual citizen is in no way concerned and has no right to be heard unless some statute gives him the right.

As the investigations by the Tariff Commission differ from judicial and quasi-judicial hearings in purpose and effect, the rules observed in such hearings do not necessarily constitute the most appropriate rules to be observed by the Commission. A court acts as an arbiter between two opposing parties who come before it and present the mer-

its of their respective sides. The Tariff Commission, on the other hand, is authorized to seek for the essential facts itself and make investigations of business in a business-like way, sending its experts to producers who are involved and getting the production costs in great detail directly from the ordinary private books of the producers wherein all expenditures have been recorded. (Revenue Act of September 8, 1916, c. 463, sec. 706, 39 Stat. 756, 797, U. S. C., Title 19, sec. 100, quoted in Appendix A, p. 35.) Such methods of procedure are fully as appropriate to the work of the Tariff Commission as judicial proceedings are appropriate to an ordinary case in court. The Commission need not rely mainly upon public hearings. Such hearings are merely parts of much broader investigations.

III

THE CHARACTER OF TARIFF INVESTIGATIONS BEFORE THE ENACTMENT OF THE 1922 LAW AND THE LEGISLATIVE HISTORY OF SECTION 315 OF THAT LAW SHOW THAT THAT SECTION DID NOT OBLIGE THE COMMISSION TO FOLLOW JUDICIAL PROCEDURE IN ITS INVESTIGATIONS

In the framing of tariff laws committees and subcommittees of each house of Congress have held hearings which consisted mainly in receiving oral and written statements from men who were not under oath and were not subjected to cross-examination. In the debates in Congress in the 1922 session members told of matters within their own knowledge and referred to committee hearings, let-

ters and telegrams, trade papers, statements by government officials, and reports prepared by the Tariff Commission. There is no reason to think that any of the information thus placed before the Congress was secured through hearings at which witnesses were cross-examined.

It is true that under the Revenue Act of 1916 (Act of September 8, 1916, c. 463, secs. 706, 707, 39 Stat. 756, 797, U. S. C., Title 19, secs. 100, 101; see also Act of September 21, 1922, c. 356, sec. 318 (f), 42 Stat. 858, 947) the Tariff Commission was authorized to subpœna witnesses and conduct hearings and that, where necessary, men could be forced both to testify and to furnish records to the Commission; but there is no sign that even where there were such hearings they were characterized by cross-examinations; and the Commission and its agents secured information from other sources, including records, papers, and other information in the possession of other departments of the Government. The method of investigation appears from a report of the Tariff Commission presented to the Senate by the chairman of the finance committee while the Tariff Act of 1922 was under consideration. (62 Cong. Rec., pt. 11, p. 11345.) The Commission said—

> * * * manufacturers of whiting were requested to submit their costs of production in accordance with a detailed schedule submitted by the Tariff Commission. The reports of the various manufacturers were

> tabulated and later verified by comparison with the books of the companies by members of the commission's staff. * * *
>
> The cost of imported whiting in the following pages was determined by a study of the invoices of shipments of whiting received at the port of New York for the months of April and May, 1922.

The report of the Tariff Commission on The Woolgrowing Industry, 1921, also shows how its investigations were conducted. The Commission held "conferences" which were open to the public, and all persons who were interested were invited to attend and submit any data which they might desire (pp. 462–592), but the report shows that the Commission did not rely entirely on these public hearings for information. Witnesses do not appear to have been cross-examined at the conferences. The report, as the Commission said (p. 28)—

> has been prepared only after examination of a great many sources of information. Field work, correspondence, public hearings, conferences with many authorities on various phases of the industry and with those concerned with sheep husbandry, and the cooperation of experts in foreign countries have made possible this survey of conditions in the wool-growing industry throughout the world.

When tariff legislation was under consideration such methods of investigation as have been outlined were customarily pursued by congressional

committees, by the Tariff Commission, and by Congress itself. This must have been known to every member of Congress and to President Harding, who had served in the Senate for nearly six years; and the basic purpose of the 1922 legislation respecting the Tariff Commission was not to change its methods of investigation. The President recommended and Congress adopted new legislative provisions extending the powers of the Tariff Commission and of the President; but this was for the purpose of making the tariff more flexible. In his annual address to Congress on December 6, 1921, President Harding said (62 Cong. Rec., pt. 1, p. 37):

> Doubtless we are justified in seeking a more flexible policy than we have provided heretofore. I hope a way will be found to make for flexibility and elasticity, so that rates may be adjusted to meet unusual and changing conditions which cannot be anticipated. * * * I know of no manner in which to effect this flexibility other than the extension of the powers of the Tariff Commission, so that it can adapt itself to a scientific and wholly just administration of the law.

When the Finance Committee reported the 1922 tariff bill to the Senate (67th Cong., 2d sess., Senate Doc. No. 187), it proposed an amendment to the House bill which empowered the President to change tariff rates (sec. 315); but the proposed

section said nothing whatever as to the manner in which the preliminary investigation should be made. (62 Cong. Rec., pt. 7, p. 7108, pt. 11, pp. 11155, 11156, 11193.) The essential purpose of the amendment, as shown by its language and by the remarks of members of the Senate, was to recognize the need of flexibility in rates in view of changing conditions in Europe. (62 Cong. Rec., pt. 6, pp. 5874, 6509, pt. 9, p. 9088, pt. 10, pp. 10144, 10145, pt. 11, pp. 11155, 11186, 11193, 11229.) Members of the Finance Committee expressed unwillingness to concede that the President should act only on information received from the Tariff Commission. (62 Cong. Rec., pt. 11, pp. 11153, 11154, 11193.) Subsequently, after the chairman of the Finance Committee had received a letter from President Harding recommending that Congress name the Tariff Commission as the source of information and recommendation upon which the President might proclaim changes in rates of duty (62 Cong. Rec., pt. 11, p. 11211), the committee proposed and the Senate accepted (62 Cong. Rec., pt. 11, pp. 11229, 11232) an amendment to the bill which provided that—

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made.

While several Senators had said that hearings would be necessary before new rates were established by the President (62 Cong. Rec., pt. 6, p. 5885, pt. 11, pp. 11155, 11156) the committee made no move towards placing such a provision in the bill until August 11, when it proposed (62 Cong. Rec., pt. 11, p. 11229) to insert in the act the words:

> The commission is authorized to hold such hearings and to adopt such procedure, rules, and regulations as it deems necessary for adequate investigation under this section; and it shall give such opportunity as it deems necessary or proper for the presentation of material facts in each case and arguments thereon. The commission shall prepare its findings in the case of each proceeding under this section, and the President shall make such findings public as soon as practicable after the issuance of a proclamation under the provisions of this section.

In the Senate this provision was amended (62 Cong. Rec., pt. 11, pp. 11231, 11232) to read:

> The commission shall give reasonable public notice and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard. Said hearings shall be public. Subject to the foregoing, the commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary. The commission shall prepare its findings in

> the case of each proceeding under this section, and the President shall make such findings public as soon as practicable after the issuance of a proclamation under the provisions of this section.

This provision was changed in conference (62 Cong. Rec., pt. 12, p. 12627) to read as it stands in the 1922 law. The entire paragraph in section 315 (c) of the law as enacted is as follows:

> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The managers on the part of the House reported (62 Cong. Rec., pt. 12, p. 12660):

> The action of the conferees eliminates the provision of the Senate amendment that the Tariff Commission hearings shall be public and that the President shall make the findings, hearings, and testimony in all proceedings public as soon as practicable after the issuance of a proclamation.

Senator Underwood, in criticizing the action of the conferees, said (62 Cong. Rec., pt. 12, p. 12888):

> When the bill passed the Senate of the United States . . . it provided that the investigation should be in the open light of day. . . . But when the bill went to conference, in the secret caucus of the majority party, those provisions of the bill which required investigation in the open by the Tariff Commission were stricken out. We are now told that they are to investigate, but they can do so behind closed doors.

Thus Congress when it enacted the law in accordance with the conference report did not intend that there should be a judicial inquiry, but clearly contemplated that the Commission should acquire information not only by hearing parties who desired to be heard but through its own investigations as well, just as Congressional committees, Congress itself and the Tariff Commission had always done. So it was that Congress struck from the Senate amendment the provisions under which all testimony would have been made public.

Read in consonance with the history and purpose of the law the words "reasonable opportunity * * * to be heard" may not be said to contemplate a judicial hearing at which all the evidence before the Commission shall be made of record for the examination of "parties interested." If these words are not thus broadly construed as importing a judicial hearing with all its incidents, including

the right to cross-examine all witnesses and to examine all proofs which are to be or have been considered by the Commission in its investigation, they must be given a reasonable construction which is in consonance with the history and purpose of the law. The apparent purpose of Congress may only be accomplished by regarding the "hearings" as supplementary to the "investigation" and like legislative hearings designed to afford an opportunity for those who may be affected by a change of tariff to appear, produce evidence and be heard in argument. "To be heard" does not in this statute mean more than just that. To construe the words more broadly would distort the process of scientific investigation in aid of the President, defeat the purpose of the statute, and destroy its usefulness.

The petitioner's brief (p. 28, see also p. 54) quotes with approval an assertion that the right granted by the 1922 law to parties interested to be present, to produce evidence, and to be heard—

> was conceded to adverse interests to protect them against the abuses of ex parte hearings and proceedings and against ex parte statements and evidence which if made known to those opposing a change of rate, might be discredited, controverted or refuted.

But no proof is advanced in support of that assertion, and the history of the section shows that Congress did not intend that the entire investigation should be made in public. By the Revenue Act of

September 8, 1916 (c. 463, sec. 706, 39 Stat. 756, 797; U. S. C., Title 19, sec. 100, quoted in Appendix A, p. 35), the Commission had been given access to the private books and records of American manufacturers and the right to make copies therefrom, and these provisions had been reinforced by sec. 318 (f) of the Tariff Act of September 21, 1922. (42 Stat. 858, 947, quoted in Appendix A, p. 36.) Obviously the ex parte investigations were to be continued and in providing that parties interested should be given reasonable opportunity to produce evidence and to be heard Congress could hardly have intended that they should have access to all the information obtained from private books and records. It fully satifies the sense and the purpose of the statute to say that they were to be given reasonable opportunity to present evidence and argument in order to supplement the investigation theretofore conducted by the Commission rather than to review it.

A real review of that investigation would not be complete unless parties interested were allowed to see the documentary evidence itself, including the books of original entry of their competitors. The right to such an inspection of books would not be confined to the books of a producer on whose request the Commission instituted the investigation. It would apply to all producers within the country whose statistics had been considered by the Commission. Indeed, if the petitioner's contention is

sound, any importer could petition for a reduction of rates and, if given the aid of the Tariff Commission, could throw open to the world the books of producers of such commodities throughout the United States. Congress obviously did not grant to parties interested any right to make such a review of an investigation by the Commission.

The petitioner's brief also relies upon a dictum by the Court of Appeals of the District of Columbia that the Commission must furnish to parties interested all data submitted to it which did not fall within a narrow definition of trade secrets and processes, and says (p. 32) that—

> Thereafter, in 1930, Congress in re-enacting the flexible tariff with many changes expressly re-enacted the provision thereof construed by the court in said case essentially in *haec verba,* thereby legislatively approving the construction thereof by said court.

The petitioner's brief shows that the Commission has not followed the dictum upon which the petitioner relies. (P. 66.) Congress knew when it enacted the 1930 law that the Commission had not followed that dictum. (See discussion in 71 Cong. Rec., pt. 4, pp. 4563–4570.) And efforts made in Congress to give to other persons access to confidential information in the files of the Commission have failed. An amendment proposed in the Senate which would have had that effect (see discussion just cited) did not pass Congress, and the bill set forth in the petitioner's brief

(p. 70) which might have placed such information at the disposal of a "consumers' counsel" did not become law. (75 Cong. Rec., pt. 9, 10035.) It can not be said that later Congressional action supports the petitioner's construction of the Tariff Act of 1922.

IV

COMPARISON WITH OTHER STATUTORY PROVISIONS DOES NOT SUPPORT THE CONTENTION THAT SECTION 315 REQUIRED THE COMMISSION TO REVEAL DATA WHICH HAD BEEN SUBMITTED TO IT AS CONFIDENTIAL

The petitioner relies upon sections of the Interstate Commerce Act and decisions thereunder to define what is meant by a hearing; but those sections and decisions have no application here. The sections relating to hearings before that commission are worded differently and have an entirely different background. They were framed on the theory that in passing upon the rights of individual carriers the commission should act judicially and conduct its hearings accordingly. But section 315 of the Act of 1922 dealt with the establishment of rates of duty which applied alike to all importers and as to which Congress had unlimited power of taxation. In such a case no importer or manufacturer had any right to a judicial or quasi-judicial investigation.

A similar contrast is afforded in the Tariff Act of 1922 itself. When dealing with the application of existing tariff rates to individual importers

Congress ordained procedural provisions which it did not put into the section which dealt with the establishment of new rates of tariff applicable to all who might thereafter import the commodity involved. Section 501 (42 Stat. at 966, U. S. C., Title 19, sec. 381), which dealt with appeals by importers from the decision of the appraiser to the Board of General Appraisers, provided that the General Appraiser who considered the appeal—

> shall give reasonable notice to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. * * *

But for this express provision the importer would have no right to cross-examine witnesses and inspect evidence. That was the rule under the Revised Statutes, which contained no such express provision. *Auffmordt* v. *Hedden,* 137 U. S. 310. In *Origet* v. *Hedden,* 155 U. S. 228, 238, the Court said that "if the importer is afforded such notice and hearing as enables him to give his views and make his contention in respect to the value of his goods, he can not complain." The absence from section 315, relating to hearings before the Tariff Commission, and the presence in section 501, re-

lating to hearings before the Board of General Appraisers, of express provisions allowing cross-examination of witnesses and inspection of all evidence produced show that Congress did not intend that the hearings before the Tariff Commission under section 315 should have all the features of judicial or quasi-judicial proceedings, but that, on the contrary, it intended that those hearings should be similar to the customary hearings before legislative committees.

V

NO STATUTE, EXECUTIVE ORDER, OR REGULATION OF THE COMMISSION REQUIRED IT TO DISCLOSE THE INFORMATION WHICH WAS HERE TREATED AS CONFIDENTIAL

The Revenue Act of September 8, 1916, c. 463, sec. 708, 39 Stat. 756, 798, U. S. C., Title 19, sec. 105, made it unlawful for any member of the Commission or any other officer or employee of the United States to divulge in any manner not provided for by law the trade secrets or processes of any person or organization embraced in any examination or investigation conducted by the Commission or by its order. The Commission has always treated this provision as binding upon the Commission as well as upon its members and has not published the costs of production in such manner as to divulge the operations of individual manufacturers. (See, *e. g.*, Tariff Information Series No. 6, 1917, p. 11; No. 18, 1919, p. 76; No. 22, 1919, pp.

14, 16, 19, 32, 92; Hearings of Subcommittee of Senate Judiciary Committee, 67th Cong., 2d sess., March 17, 1922, p. 616; 71 Cong. Rec., pt. 4, pp. 4563–4570, Oct. 15, 1929.) Of course, where there were many producers, as in the instance cited in the petitioner's brief (p. 67) costs might be published by substituting numbers in lieu of names. In the present case only two companies appear to have been producing sodium nitrite in the United States. (R. 171.) In the Commission's Report or Summary (R. 163) all information in regard to costs of manufacture of individual firms, which domestic manufacturers regarded as "trade secrets" within the meaning of section 708 of the Revenue Act of 1916, were eliminated. (R. 164, 171, 172.)

But while the Commission relied upon the provisions of the Act of 1916 it is not necessary to consider whether the act would have been violated if the Commission had divulged the costs of individual producers. That act did not require the publication of all of the information which was placed at the disposal of the Commission; and it certainly did not require the publication of data which had been submitted under a promise that individual costs would not be revealed.

The Executive Order of President Harding (R. 63) simply provided that investigations—

> shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.

The rules of the Commission (R. 63–67) did not suggest that parties interested had any right to cross-examine witnesses. Those parties had simply (R. 65) the right—

> to offer such relevant testimony, both oral and written, as the Commission may deem necessary for a full presentation of the facts involved in such investigation.

The Commission had its own substitute for cross-examination, a substitute which was better adapted to the purposes of its investigations than proceedings judicial in form could possibly be. In accordance with its rules (R. 65; see also Act of September 8, 1916, c. 463, sec. 706, 39 Stat. 756, 797, U. S. C., Title 19, sec. 100, quoted in Appendix A, p. 35.)

> Evidence, written or oral, submitted in hearings shall upon order of the Commission be subject to verification from the books, papers, and records of parties in interest. Such further investigation may be had as the Commission shall order.

The only rule which offers any shadow of support to the contention that the petitioner was entitled to knowledge of the data which was refused is the rule (R. 67) which allowed parties to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as related to trade secrets and processes. The only question is whether the Commission could give to the words

"trade secrets and processes" the meaning which it gave to them in the present investigation.

Undoubtedly the Commission could have adopted a rule which provided specifically that the costs of individual producers should be treated as strictly confidential, for such a rule would have been within the statutes and the Executive Order. Or the Commission could have stated prospectively that "trade secrets" should not be divulged and that the term "trade secrets," as used by it, included individual costs of production. Or, as the Commission's rules "are subject to amendment and modification at the discretion of the Commission" (Sixth Annual Report, 1922, p. 3), it could even adopt an interpretation of an existing rule which extended that rule, and such an interpretation would be valid unless it impaired rights which had already accrued. In the present case the only rights which had accrued were those of the companies which had furnished information as to costs to the Commission with the claim (R. 172) which the Commission conceded (R. 164) that such information must be regarded as a trade secret.

Therefore, regardless of the meaning which courts may give to the phrase "trade secrets or processes" when construing the Revenue Act of 1916, it seems clear that the rules of the Commission, as understood by those who had framed them and who could change them at any time, did not

require the divulging of facts which were here treated as confidential. Such an interpretation of its own rules would be binding upon the courts.

It is obvious that in some lines of industry, as where many manufacturers are engaged in producing the same article in the same way, there is no reason for secrecy as to methods or costs of production. It is equally obvious that where a new industry is being built up, where the two or three manufacturers of an article are truly pioneers, the methods and costs of production are naturally regarded as secrets which the individual manufacturers are unwilling to divulge to their competitors directly and are unwilling to divulge to the Government unless the data are to be held strictly confidential. The Tariff Commission has met these situations by assuring manufacturers that it will not divulge trade processes nor individual costs of production. In taking this position as to costs of production it has gone further than is always necessary. But surely when the Commission is making an investigation it may say to all who are concerned that it will not make public or disclose to competitors business information which is considered confidential and could not otherwise be obtained. Such information is secret and to narrowly construe the statute as applying only to secret processes is to defeat the fair and just purpose of the law.

In such a case as the present one the costs per unit of labor and of the materials which were actually used in the plant of the American Nitrogen Products Company might be matters of common knowledge, and yet a disclosure of the amounts of money paid out for labor and for the different materials used by that concern might give to a shrewd and eager competitor important clews to the processes used by this American company. Even if the Commission divulged only a part of the cost of an individual manufacturer it might inadvertently publish to the world information concerning trade processes the full significance of which was not realized by the Commission and the publication of which would seriously injure the American producer. The only safe course for the Commission to follow was to lay down the broad rule that it would not publish individual costs of production. Only in that way could it secure the confidence and the cheerful cooperation of the business enterprises which it was investigating. Only in that way could the Commission successfully perform its duties under the Tariff Act. Congress declared that changes in rates should be made in order to equalize costs of production at home and abroad; but American producers would hardly dare to appeal to the Commission for aid if in order to secure it they were obliged to expose their business secrets to their competitors at home and abroad.

CONCLUSION

The decision of the Court of Customs and Patent Appeals should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
ROBERT P. REEDER,
Attorney.

DECEMBER, 1932.

Charles D. Lawrence
Assistant Attorney General,
Of counsel.

APPENDIX A

STATUTES INVOLVED

The Revenue Act of September 8, 1916, c. 463, secs. 706–708, 39 Stat. 756, 797, 798, provided:

> SEC. 706. That for the purposes of carrying this title into effect the commission or its duly authorized agent or agents shall have access to and the right to copy any document, paper, or record, pertinent to the subject matter under investigation, in the possession of any person, firm, copartnership, corporation, or association engaged in the production, importation, or distribution of any article under investigation, and shall have power to summon witnesses, take testimony, administer oaths, and to require any person, firm, copartnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation. Any member of the commission may sign subpœnas, and members and agents of the commission, when authorized by the commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.
>
> * * * * *
>
> SEC. 707. That the said commission shall in appropriate matters act in conjunction and cooperation with the Treasury Department, the Department of Commerce, the Federal Trade Commission, or any other departments, or independent establishments of the Government, and such departments and

independent establishments of the Government shall cooperate fully with the commission for the purposes of aiding and assisting in its work, and, when directed by the President, shall furnish to the commission, on its request, all records, papers, and information in their possession relating to any of the subjects of investigation by said commission and shall detail, from time to time, such officials and employees to said commission as he may direct.

SEC. 708. It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent, or clerk of said commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. * * *

The Tariff Act of September 21, 1922, c. 356, sec. 318 (f), 42 Stat. 858, 946, provided:

The second paragraph of section 706 of the Revenue Act of 1916 is amended to read as follows:

"Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any district or territorial court of the United States or the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the

production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

The Tariff Act of September 21, 1922, c. 356, sec. 315, 42 Stat. 858, 941–943, provided:

(a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such

articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in cost of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in cost of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United

States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or simi-

lar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

* * * * *

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

* * * * *

APPENDIX B

ANSWER OF UNITED STATES TARIFF COMMISSION

The following extract from the record in *United States ex rel. Norwegian Nitrogen Products Co., Inc.*, v. *United States Tariff Commission et al.*, in this Court, 1926 Term, No. 91, pp. 50–70, sets forth the answer which the Tariff Commission and its members filed in the Supreme Court of the District of Columbia on January 4, 1924, in response to a petition on relation of the Norwegian company for a writ of mandamus.

> The United States Tariff Commission and Thomas O. Marvin, William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess and Henry H. Glassie, the Commissioners constituting the United States Tariff Commission, answering, say:
>
> 1. Respondents, upon information and belief, admit that the relator, Norwegian Nitrogen Products Company, is a corporation organized and existing under the laws of the State of New York and is engaged in the business of importing sodium nitrite for sale in the United States. But respondents, upon information and belief, aver that relator is not engaged in the general business of importing sodium nitrite as such, but is the exclusive agent, selling on commission, of a certain Norwegian corporation engaged in the business of manufacturing and producing sodium nitrite for exportation to and sale within the United States; and that, in respect of the proceedings before the United

States Tariff Commission mentioned in its petition for mandamus, the relator was, and is, acting for and on behalf of such Norwegian manufacturer.

2. Respondents admit that the United States Tariff Commission is a public body created by and existing under the statutes of the United States; that the individual respondents, Marvin, Culbertson, Lewis, Burgess, Costigan and Glassie, are severally the six Commissioners constituting said Commission, said Commissioners, for the purpose of the discharge of their official duties, being located at the seat of government within the District of Columbia; and that the principal office of such Commission is in the District of Columbia.

3. Respondents admit that the power, authority, and duties of the said Tariff Commission, and the several Commissioners composing the same, are prescribed, declared and defined by the provisions of Title VII of the Revenue Act of 1916 and by the provisions of the Tariff Act of 1922 mentioned in Relator's petition; but for greater certainty beg leave to refer to the text of said statute.

4. Respondents admit that, in pursuance of the authority vested in him by the Tariff Act of 1922, the President, on October 7, 1922, promulgated an Executive Order in words and figures as set forth in said petition.

5. Respondents admit that, on October 20, 1922, the said Commission promulgated certain Rules of Procedure, among which are the provisions mentioned in Relator's petition, but for greater certainty crave leave to refer to the text of the said Rules, a true copy whereof is annexed to this Answer,

marked Exhibit I, and prayed to be read as a part hereof.

6. Respondents admit that, on October 30, 1922, the American Nitrogen Products Company, a corporation under the laws of the State of Washington, having its principal office at Seattle in said State by its President and General Manager, C. F. Graff, filed with the United States Tariff Commission an application (called by relator a petition and brief) praying for an increase in the rate of duty imposed by the Tariff Act of 1922 upon imported sodium nitrite from the rate of three cents per pound, as provided in said act, to a rate of four and one-half cents per pound, being the maximum increase of fifty per centum in addition to the rate of duty imposed by said act.

7. Respondents admit that thereafter, having duly considered and inquired into the subject matter mentioned in said application, the United States Tariff Commission, on the 27th day of March, 1923, passed an order whereby it instituted an investigation of the differences in foreign and domestic costs of production of sodium nitrite. Said order is in words and figures as follows:

"*Investigation No. 7 by the United States Tariff Commission for the Purposes of Section 315 of the Tariff Act of 1922*

SODIUM NITRITE

"The United States Tariff Commission on this 27th day of March, 1923, for the purpose of assisting the President in the exercise of the powers vested in him by Section 315 of Title III of the Tariff Act of 1922 and under the powers granted by law and pursu-

ant to the rules and regulations of the Commission, hereby orders an investigation of the differences in costs of production of, and of all other facts and conditions enumerated in said Section with respect to, the articles described in Paragraph 83 of Title I of said Tariff Act, namely: Sodium Nitrite, being wholly or in part the growth or product of the United States, and of and with respect to like or similar articles wholly or in part the growth or products of competing foreign countries.

"Ordered further, that all parties interested shall be given an opportunity to be present, to produce evidence, and to be heard at a public hearing in said investigation to be held at the office of the Commission in Washington, D. C, or at such other place or places as the Commission may designate, on a date hereafter to be fixed, of which said public hearing at least thirty days' public notice shall be given by publication once each week for two successive weeks in 'Treasury Decisions' published by the Department of the Treasury, and in 'Commerce Reports' published by the Department of Commerce, copies of which said publications are obtainable from the Superintendent of Documents of the Government Printing Office in Washington, D. C.

"And ordered further, that public notice of said investigation shall be given by posting a copy of this order for thirty days at the principal office of the Commission in the City of Washington, D. C., and at the office of the Commission at the port of New York, and by publishing a copy of this order once a week for two successive weeks in said 'Treasury Decisions' and in said 'Commerce Reports.'"

8. Respondents, denying that it or they ordered or instituted such investigation upon the allegations of said application, say that the United States Tariff Commission, having conducted said investigation in the field in accordance with the provisions of the statutes creating, as well as prescribing, defining and declaring the duties of the United States Tariff Commission made, issued and published the order giving notice of the public hearing to be held in such investigation in the words and figures as set forth in realtor's petition.

9. Respondents admit that, subsequent to July 20, 1923, and prior to September 20, 1923, the relator, Norwegian Nitrogen Products Company, entered its appearance in said proceedings by counsel and then and thereafter made request of said Commission for a copy of the aforesaid application (called petition and brief) of said American Nitrogen Products Company. But respondents deny that the grounds and reasons upon which the United States Tariff Commission ordered said investigation to be made and the proceedings therein to be had, are set out in the said application or petition. On the contrary, respondents say that the action of said Commission in ordering said investigation for the purposes of said Section 315, was not taken in response to, nor was the same based upon or grounded upon, the allegations set out in said application or petition, which was treated in the same manner as other applications are treated by the said Commission, namely, as in the nature of a suggestion only, the provisions of said Section 315 being applied in the public interest and for general public purposes, and not at the suit of private parties in their own private in-

terest. Respondents aver that the action taken by said Commission in instituting said investigation was taken upon the official judgement and determination and responsibility of the persons composing the said Commission in pursuance of their official duties, and after due inquiry, not only into the matters alleged in said application, but also into all other available information and data respecting the advisability or inadvisability, in the public interest, of instituting an investigation into the differences of costs of production of sodium nitrite in the United States and in the principal competing foreign countries, for the purpose of assisting the President in the application of the provisions of Section 315 of the Tariff Act of 1922.

10. Respondents admit that the application (called petition and brief) of said American Nitrogen Products Company was, at the times mentioned, and is now, in the custody of the United States Tariff Commission. But respondents deny that said application is a public record. On the contrary, they aver that said petition or application is in the nature of a suggestion only, drawing the attention of the Commission as in other cases to a supposed condition of nonequalization between the existing customs duty and the differences between foreign and domestic costs of production with a view to Presidential action under the provisions of Section 315 of the Tariff Act of 1922; that the allegations in said application, as in other similar applications, were made under the protection and sanction of Section 708 of the Revenue Act of 1916, as will hereinafter be more fully shown, and are in respect of all statements concerning methods and cost of pro-

duction, including material costs, costs of power, labor costs, and other items of cost, of the person, firm, or corporation filing the application, essentially confidential and privileged, and entitled to the protection of said Section 708. Respondents further aver that no private right exists, as a matter of course, to the institution of an investigation looking to a change in any rate of customs duty, nor is the United States Tariff Commission bound, by reason of any such application or the allegations therein, whether made under oath or not, to expend the public money or devote the public time to investigations upon the subject matter mentioned therein. Nor is the Commission bound to disclose such allegations to parties claiming to be interested in the increase, decrease or maintenance of the existing rates of duty on the article mentioned in said application. But respondents aver, that the action of said Commission must be, and is, determined upon considerations of public interest and upon examination of such information as may be available, statistical or otherwise, relevant to the subject matter, and indicating, in the judgment and discretion of said Commission, the advisability or inadvisability of ordering in the public interest an investigation for the purpose of said Section 315. Respondents further aver that, when such an investigation is instituted in the exercise of the Commission's power and authority, the allegations or statements in any application made by any particular individual or corporation in relation to said subject matter, and particularly any statements concerning applicant's methods or costs of production, are of no lawful concern to any other person or persons claiming to be interested in the sub-

ject matter of said investigation, whether as a manufacturer, producer, buyer, seller, purchaser, importer or otherwise.

11. Respondents aver that long subsequent to the filing of said application of the American Nitrogen Products Company and also subsequent to the issuance of the order of March 27, 1923, instituting said investigation (which was not entered upon said application), said Commission sent certain of its special experts, being officers of the United States acting under the sanction of their respective official oaths, to visit and inspect all plants in the United States producing sodium nitrite, including the plants and offices of the American Nitrogen Products Company, and also to visit and inspect all plants known to be producing sodium nitrite in the principal competing foreign countries manufacturing that article. But respondents deny that said Tariff Commission, or its officers, experts, agents or investigators received and accepted from the said American Nitrogen Products Company, *ex parte* and secret information respecting the costs of producing sodium nitrite by said company and in said foreign countries, or that any such information was received in support of allegations made by said American Nitrogen Products Company. On the contrary, respondents aver that all information and cost data obtained from the said American Nitrogen Products Company were obtained in the same manner as from the other companies producing sodium nitrite in the United States and according to the usual practice in such cases in the performance and discharge of official duties. All such data were obtained from the regular and ordinary books of account of the said Company by

official experts specially trained, skilled and experienced in that work, and in pursuance of the regular and usual course of procedure pursued under the statutes by the United States Tariff Commission in all investigations conducted by it for the purposes of Section 315 of said Tariff Act of 1922.

12. In further answer to the allegations of this section of relator's petition and the Rule to Show Cause issued thereon, these respondents further say:

(*a*) That the United States Tariff Commission was created and established by the provisions of Title VII of the Revenue Act of 1918; that in and by the provisions of said Title the general powers and functions of said Commission in respect of the administration, operation and industrial relations and effects of the customs duties of the United States and the conditions, causes and effects relating to competition of foreign industries with those of the United States were declared and established; and in and by the provisions of said Title it was provided that, for the purpose of carrying said Title into effect, the Commission or its duly authorized agent or agents should have access to and the right to copy any document, paper or record, pertinent to the subject matter under investigation, in the possession of any person, firm, copartnership, corporation or association engaged in the production, importation or distribution of any article under investigation, and should have power to summon witnesses, take testimony, administer oaths, and to require any person, firm, copartnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation, all of which investigational

powers are made subject, as will hereinafter more fully appear, to the condition that it should be unlawful to divulge or make known in any manner whatever, not provided for by law, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination of investigation conducted by said Commission.

(*b*) That, in and by Section 315 of the Tariff Act of 1922, it is provided that, in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by said Act intended, the President shall have power, upon investigation to be made by the United States Tariff Commission, to ascertain the differences in costs of production of domestic articles and of like or similar articles produced in foreign countries and to proclaim the changes in classification and increases and decreases in rates of tariff duty which may be necessary to equalize the differences in costs thus ascertained.

(*c*) That in and by subsection (*c*) of said Section 315 it is further provided that, in ascertaining differences in costs of production under the provisions of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government,

or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

(*d*) That, in and by said Section 315, it is provided that investigations to assist the President in ascertaining difference in costs of production under said section shall be made by the United States Tariff Commission and no proclamation shall be issued by the President until such investigation shall have been made.

(*e*) That, in making such investigation to assist the President in the exercise of said powers under Section 315 of the Tariff Act of 1922, the Tariff Commission is vested by the provisions of Title VII of the Revenue Act of 1916, supplemented by the provisions of the Tariff Act of 1922, with the power, and is under the necessity, of obtaining as far as practicable, the individual costs of production of the several persons, partnerships, firms, corporations or associations producing the article constituting the subject matter of said investigation and must take said individual production costs. as far as practicable, directly from the ordinary private books of account of individuals, firms, and corporations, wherein have been recorded, in the usual course of business, all expenditures by said manufacturers for and on account of the immense variety of separate items constituting, and going to make up, the costs of production of such articles; that such inquiry involves taking from said books of account the amount of capital invested by said persons in their said manufacturing plants; the amount of interest, if any, paid upon loans secured for the purpose of manufacture; the amounts paid in

each particular purchase for the several species or kinds of materials entering into said manufacture; the amounts respectively paid the several kinds and classes of employees or workmen engaged in said manufacture; the salaries paid to the several officers and employees of said manufacture; the amounts paid the persons employed for expert technical, chemical, research or other scientific and laboratory assistance in such manufacture. Such inquiry further includes the total gross sales of the articles in question and an ascertainment of the direct labor cost, material cost, and overhead cost per unit of the articles produced by each of said domestic manufacturers who are necessarily in competition not only with the foreign, but also with other domestic producers of the same article. It further includes the amounts paid both in detail and in general and by particular units for the selling or marketing expense incurred in placing said article and each unit thereof on the markets for said product.

(*f*) That by section 708 of the Revenue Act of 1916, it is provided:

It shall be unlawful for any member of the United States Tariff Commission, or for any employee, agent or clerk of said commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be punished by

a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment. The commission shall have power to investigate the Paris Economy Pact and similar organizations and arrangements in Europe.

(*g*) That the several items of individual costs necessary to be taken from the books of each producer and analyzed and collated as in sub-section (*c*) set out, are in their nature trade secrets of the several persons, firms, co-partnerships, corporations or associations embraced in said examination and investigations; that the disclosure of said items by the Tariff Commission would constitute a direct injury and legal wrong to every such person, firm, co-partnership, corporation or association, inasmuch as it would disclose to his, its or their several competitors the precise elements, trade secrets and processes which constitute its particular advantage or disadvantage in competition, and would thereby permit unlawful and irreparable injury to private property of great value.

13. Further answering, respondents say that, pursuant to the statutes and in conformity with the practice described in the preceding paragraph, the United States Tariff Commission, having instituted the investigation by the order of March 27, 1923, proceeded in said investigation as follows:

(*a*) Special experts in the service of the Commission, being officers of the United States, acting under the sanction of their several official oaths and in the course of their official duty, were dispatched to the plants of the three companies known to be

producing sodium nitrite in the United States,—namely, the American Nitrogen Products Company, located at Le Grande, Washington; the Semet-Solway Company, located at Syracuse, New York; and the Harshaw-Fuller-Goodwin Company, located at Cleveland, Ohio,—for the purpose of obtaining from the original books of entry of said companies all data required for the ascertainment of the cost of production of sodium nitrite in their respective plants. Said special experts accordingly obtained from each of the said companies, upon cost schedules framed in accordance with accepted accounting practice, the data on their books respecting the actual costs of production of the quantities of the sodium nitrite produced therein, that is to say, the quantity and cost of the several materials used in the manufacture of sodium nitrite by the particular process employed in each factory, as well as the total costs of such materials; the cost of direct labor, skilled, semi-skilled, and unskilled, in the conversion of such materials into the finished product, including such labor cost in respect of each successive stage in such conversion; the details of factory expense involved, including labor and material used in repairs, supplies, power, light and heat and overhead; all amounts disbursed for general expense, including administrative salaries, office expense, research and laboratory and other expenses; fixed charges including depreciation, taxes, both Federal and State and local, insurance, rent where actually paid, interest paid on bonds and short-time loans and other forms of borrowed capital used in the business and the capital actually invested in plant and equipment; selling expense, whether in the

form of commissions paid to agents and distributors, or by direct disbursements; total production capacity of the plant; the amount of the gross sales of all products manufactured by each of said companies, including sodium nitrite, and the amount of the total gross sales of sodium nitrite; the average number of wage earners employed, the average wage rates for each class of labor employed; the principal markets for the finished product, and the average price received for sodium nitrite by each of said companies for the years 1920 and 1921; the yield of sodium nitrite per pound of the particular material principally used in each plant as indicative of the degree of efficiency of plant operation.

(*b*) The production-cost data described in the preceding subparagraph (*a*) and required by the Commission under the authority of section 708, Title VII, Revenue Act of September 8, 1916, supplemented by the Tariff Act of 1922, were furnished by each of the three companies aforesaid and access to and the right to copy all and any documents, papers or records of said companies pertinent to the subject-matter of said investigation, was accorded as required by said Section 708 of said Title VII, upon the conditions and under the sanctions established by Section 708 of said Title making it unlawful to divulge to any person in any manner not provided by law, the trade secrets or processes of any person, firm, co-partnership or association embraced in such examination or investigation. And respondents say that the information and access thus obtained by this Commission was furnished by said companies, including the American Nitrogen Products Company, upon the faith of said

statute and upon the consequent understanding, recited in the forms and schedules of the Commission, that the costs of individual persons, firms, or corporations would be held strictly confidential and were for the exclusive use of the Commission and would be published only in such manner as would not divulge the operations of individual manufacturers.

(*c*) Special experts in the service of the Commission, being officers of the United States, acting under the sanction of their several official oaths and in the course of their official duty, were dispatched to Norway (which is the principal competing country in the production of sodium nitrite), for the purpose of obtaining from the books of original entry all data required for the ascertainment of the cost of production of sodium nitrite, and data were sought to be obtained in like manner as in the United States from the offices of the Norsk Hydro-Elektrik-Kvaelstofaktieselskab (Norwegian Hydro-Electric Nitrogen Corporation), located at Kristiania, Norway, the sole company manufacturing sodium nitrite in Norway. Direct access to the books of said corporation, although duly requested, was refused by said corporation, and inasmuch as the United States Tariff Commission was without power to enforce obedience in Norway to its said request, no information or cost data were obtained directly from said manufacturer, though said special experts of the Tariff Commission were permitted to go through the plant of said corporation. Said special experts, however, did obtain, from other sources of a public nature, information relating to power costs in the production of sodium nitrite, prices of soda ash, wage rates,

and other factors entering into the production costs, from which information, combined with published reports and other information respecting the operations of said Norwegian company, an estimate for use in its summary of information hereinafter referred to was made of the cost of production of sodium nitrite in Norway.

(*d*) Special experts of this Commission, being officers of the United States acting under the sanction of their several official oaths and in the course of their official duties, were also dispatched to Germany, another competing country in the production of sodium nitrite, and cost of production data similar to that hereinbefore described were sought to be obtained in the same manner from the offices of the Badische-Anilin und Soda Fabrik Co., located at Berlin, Germany, but access to the books of said company was refused and the experts of the Commission were unable to obtain any further information with respect to the costs of production of sodium nitrite in Germany except data as to wholesale prices at the factory of this company with transportation rates upon said article.

(*e*) In conformity with the established practice of the Commission, the cost of production data obtained as described were collated and tabulated at the office of the Commission and subjected to analysis and the results of the information gathered by the Commission in such investigation were summarized in a written report or Summary of Information, excluding therefrom only the summary of or report upon such portions of such information as related to trade secrets or processes; and such Report or Summary was made public and furnished to each of

the parties in interest appearing in such investigation, including the relator, Norwegian Nitrogen Products Company, during the course of the public hearing in such investigation which, as hereinbefore stated, had been ordered for September 10, 1923, and public notice whereof had been duly published in accordance with the rules of the Commission. In said Report or Summary no figures were given as to production costs of sodium nitrite in the United States for the reason first, that the individual costs of production of the several plants could not be stated without directly revealing the trade secrets of said producing companies in violation of the provisions of said Section 708, and second, that on account of the limited number of companies producing said article, said production costs could not be stated in the form of averages without revealing in substance and effect the individual production costs and thereby divulging the trade secrets and processes of said producing companies.

14. Respondents are advised and believe, and therefore aver, that for the United States Tariff Commission, or for any member, employee, officer, or agent thereof, to divulge or to make known in any manner whatever, to the Norwegian Nitrogen Products Company, its officers, counsel or agents, or to any other person, the individual costs of production of the American Nitrogen Products Company, would be an offense against the provisions of Section 708 and a misdemeanor punishable by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and would further involve the dismissal from office of the six respondents con-

stituting the United States Tariff Commission.

15. Respondents further say, that on September 10, 1923, in accordance with public notice theretofore issued and published, a public hearing in said investigation was held at the office of the Commission in the City of Washington.

(*a*) At said hearing the relator, Norwegian Nitrogen Products Company, appeared by counsel and was accorded an opportunity to be present, to produce any evidence it had to produce, and to be heard fully and at length upon the questions involved in said investigation; was accorded an opportunity to cross examine, and relator by its counsel did cross examine the only witness appearing in said investigation, namely, C. F. Graff, President and General Manager of the American Nitrogen Products Company, interrogating by its counsel said witness at length concerning the accuracy of statements contained in the application of the American Nitrogen Products Company with regard to the profit earned in the production of sodium nitrite, the outstanding capital stock of the company, preferred and common, the extent to which said capital stock was paid in, what it represented, what assets were behind it, its present value, and the facts and circumstances respecting a certain alleged suit brought by the minority stockholders of said company, and in general what relator's counsel described as the "financial background of said company"; and further concerning the sale or disposition of a certain plant formerly owned by said company at Lake Bunsen in British Columbia, the ownership of the common stock of a certain Nitro Development Company, the terms, provisions and

conditions of an alleged contract between the American Nitrogen Products Company, Nitro Development Company, Graff Construction Company, and C. F. Graff and E. L. Blaine, concerning the construction work of the American Nitrogen Products Company's plant, the commission allowed to the second company on account of said contract, and other matters of detail with regard to said contracts, but without having called on the American Nitrogen Company for the production of said contract and without having given any notice for that purpose and without any offer to submit or produce the papers at the hearing. Relator was permitted to examine the witness with respect to the American Nitrogen Products Company's existing contracts, the last sales made, the prices at which the same was sold, and also with respect to the difference between modes of manufacture in Norway and in the United States. Witness stated that the data submitted to the Commission showed that only the actual investment in the La Grande plant, and not the amount of capital stock issued, had been taken into account in connection with the production costs of the American Nitrogen Products Company.

The witness stated that he was willing to give and did give the cost of investment of the American Nitrogen Products Company's plant at La Grande as included in their figures or costs of production, and the labor employed there, and did state approximately the investment in said plant and the depreciation thereon, but declined to go into the cost of labor, the cost of power, and the cost of material, all of which witness claimed to be competitive information theretofore furnished the Commission, but information

which they did not care to disclose in open hearing to their competitors. And this Commission declined to direct said witness to disclose said information in open session.

(*b*) At said session of September 10, 1923, the relator by its counsel made a formal request to be supplied with a full and complete copy of the application of the American Nitrogen Products Company without eliminating therefrom any matter, whether deemed by the Tariff Commission to be trade secrets or not. Pending the consideration of this request and the determination as to what portions of the statements made by the American Nitrogen Products Company the Commission would permit relator to examine, relator's counsel stated that they had no testimony to submit.

The hearing was thereupon adjourned to September 26, 1923.

16. Respondents further say that, after the adjournment of the hearing of September 10, 1923, and before the opening of the adjourned session on September 26, 1923, the Commission furnished all parties appearing in said investigation, including relator, with a Report or Summary of Information in which were stated the results of the examination and investigation made by the Commission's special experts, including an estimate of the cost of production of sodium nitrite in Norway, indicating that the average invoice value was 4.84 cents per pound c. i. f. New York. Included in this price are the following charges:

	Per 100 pounds
Packing	$0.204
Inland freight	.026
Ocean freight and insurance	.273
Total	0.503

Deducting these charges, said estimate tended to show that the average price received at the factory in Norway was 4.34 cents per pound.

17. At said adjourned hearing on September 26, 1923, relator, by its counsel, again appeared and stated that he had received said Summary, that he had transmitted to Norway a cable summarizing the statement of estimated costs of production in Norway, showing 4.34 cents per pound at factory as Norwegian cost of production, and requesting the Norwegian company to telegraph instructions for the hearing on September 26; that in reply relator's counsel had received a cable stating, in substance, that the Tariff Commission's estimate was completely erroneous; that the cost of production by far surpassed their estimate; that on principle the Norwegian company always refused to publish cost figures and consequently did not furnish the Commission's investigators any information enabling them to calculate cost prices; that said company strongly protested investigators' competence; that the letter from relator's counsel, dated September 9, had been received and that no time had existed to study the same but that perusal permitted them to state that several Graff statements regarding the company and processes were incorrect.

Upon attention of relator's counsel being drawn to the fact that the Commission had been accorded no opportunity to get information from his clients, relator's counsel stated as follows:

"No, sir. As I read the statute, our client, being an interested party, has a right to be present, to produce evidence, if he wants, or not, and to be heard, without submitting him-

self to the jurisdiction of this Commission for examination, and without submitting to this Commission, in consideration of his statutory rights, any evidence of others or of himself. We understand that the statute accords our client certain rights, to be present and to be heard, and to produce evidence without any consideration therefor, and the statute does not exact, as I have stated before, as a condition precedent, that before we can enjoy these statutory rights we must submit any evidence as to any of our processes, any of our costs, or any other data."

Relator's counsel thereupon requested an extension of thirty days. Being asked whether, if any extension of time was permitted, the Commission would receive from him the figures of cost production in Norway, relator's counsel answered, in substance, that he would not make any promise in that regard. It was thereupon drawn to his attention that, inasmuch as the cable from Norway declined to give the information the Commission desired, no information of the kind could be obtained in any length of time, to which relator's counsel replied:

"The Commission is asking us to produce the cost of production in our own factory. That is not all the evidence of the cost of production of sodium nitrite in Norway. I may go further and say that the cost of production in the factory of the Norwegian Products Company might be found by this Commission not to be the fair cost of production, or the cost of production in Norway."

Said relator's counsel further stated:

"The question is, what is the cost of production in the United States, and not what is the cost of production in Mr. Graff's factory in Seattle. Upon these subjects we are

ready to offer proof, and to do so it is not necessary for us to exhibit to this Commission the costs of production in our own factory."

Relator's counsel renewed his request for additional time in which to examine and produce evidence of foreign costs of sodium nitrite, and in disputation of the Commission's Report or Summary, submitted on September 15, 1923, stating that, although the Norway producers had refused to disclose their costs of production to the Commission, they insisted upon additional time, after the matter had been discussed in public hearing, for the purpose of producing evidence of a general nature on costs of production in Norway; and that relator relied strictly upon the statute. The Commission thereupon ruled that, inasmuch as the Norway producer, knowing that the principal issue at the hearing was the differences between American costs of production and Norwegian costs of production, including their costs of production, had refused the Commission access to their books and declined to give the required information, counsel had had ample time to prepare a statement of costs of production of his Norway clients and meet the issue at the Hearing, the Commission declined to adjourn the Hearing beyond October 6, 1923.

Thereupon relator, by its counsel, made the following formal requests:

I want to make formal request, as an interested party appearing in this case, that we have all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets or processes. That is request No. 1.

We want to make the further request that the Commission afford us the same rights to

inspect, and to offer in evidence in disputation thereof, if we see fit, and to be fully heard upon, all the evidence in the possession of the Commission, as to the cost of power in the United States in the production of nitrite.

Third, the same request as to the number of laborers employed, and the wages paid in the American Nitrogen Products testimony submitted before the Commission.

Fourth, the same request as to all capital invested in the American Nitrogen Products Company plant in the State of Washington.

Fifth, referring to the summary of information in the matter of sodium nitrite, the subject of a public hearing September 10, 1923, that we have opportunity to cross-examine the experts of this Commission who gathered this testimony, as to the testimony which they have submitted to the Commission, and that we have the right to offer such testimony as we may see fit and reasonable opportunity to be heard thereupon.

The Commission thereupon took said requests under consideration and stated that the Commission's decision in writing would be sent to the counsel by October 4 and also announced at the adjourned Hearing on October 6.

(*e*) On October 2, 1923, this Commission transmitted to the relator's counsel, a certified copy of the Commission's Minutes showing the ruling upon the foregoing requests made by the relator's counsel on September 26, 1923. These rulings were announced by the Commission at the adjourned Public Hearing resumed on October 6, 1923, and are in words and figures as follows:

"1. The Commission, in addition to holding a public hearing in which Judge De Vries participated as counsel for the parties

of record represented by him, has submitted to the parties appearing at such hearing a written statement embodying the result of the Commission's field investigation. At the adjourned hearing, set for October 6, 1923, all parties interested, including those represented by Judge De Vries, will have an opportunity to meet the matter embodied in such statement. In so far as the first request of Judge De Vries is a request for leave to inspect the original and primary data collected by the Commission's investigators in the field and embodied in such statement, or is a request for additional information respecting the same beyond what the Commission has already submitted, the request is denied."

"2. At the adjourned public hearing, set for October 6, 1923, opportunity will be afforded all parties interested to offer any evidence they may have with respect to the matter embodied in the Commission's statement of the field investigations conducted by its staff and such parties will have opportunity to be heard upon the same. In so far as the second request of Judge De Vries is a request to offer evidence and to be heard upon the question of the cost of power in the United States for the production of nitrites and to offer evidence and to be heard in respect of the matter embodied in the statement submitted by the Commission to the parties, the request is granted. In so far as it is a request to inspect the original cost and other data collected in the field by the Commission's investigators or the figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"3. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to the number of laborers employed and the wages paid by the American Nitrogen Products Company. To this extent the third request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"4. At the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession with respect to capital invested in the American Nitrogen Products Company. To this extent the fourth request of Judge De Vries is granted; but in so far as that request asks for inspection of the original data relating to the production of the American Nitrogen Products Company submitted by or obtained from said company under the sanction of Section 708 of Title VII of the Revenue Act of September 8, 1916, the request is denied.

"5. The fifth request of Judge De Vries, in so far as it asks for an opportunity to cross-examine experts of the Commission with respect to the costs data and other matter obtained by them in the course of the investigation in the field, is denied. But at the adjourned hearing set for October 6, 1923, all parties interested will be afforded an opportunity to offer any relevant and material evidence in their possession, and to be

heard, with respect to the matter embodied in the Commission's statement heretofore submitted to the parties interested appearing in such investigation. In so far as the fifth request of Judge De Vries is a request for an opportunity to meet, by evidence and argument, the matter embodied in such statement, the request is granted. In so far as it is a request to cross-examine the Commission's investigators concerned in obtaining the matter summarized in said statement with respect to the performance of their official duties and functions in such investigation, and in so far as it is a request for inspection of the cost data and other matter so obtained and embodied in said statement, said request is denied."

(*f*) Respondents further say that, although at the sessions of the Public Hearing held respectively on September 10, September 26, and October 6, 1923, it was announced by the Chairman that the principal matter in question was the difference between production costs in the United States and production costs in Norway, and although every reasonable opportunity was accorded relator's counsel to present evidence, either openly or in confidence on that question, and although relator's counsel was expressly asked whether he expected to offer any testimony through witnesses, said counsel replied in the negative, and stated that all information which he would offer the Commission would be printed as a part of his brief; that it would not be sworn testimony but would be in the form of telegrams, cables, and answers to them, and copies of official documents; and that such matter was submitted by relator's counsel as information having probative force in determining the action

of the Commission, subject, if doubted, to investigation for the purposes of verification.

(*g*) Respondents further say that on the ninth day of October, 1923, relator submitted and filed with this Commission in the said Investigation, a printed brief of 93 pages wherein, in addition to argument upon the law of the case and upon the facts shown at the Hearings and in the Summary and Report furnished interested parties by the Commission, relator, submitted a mass of documentary evidence respecting the value of the La Grande plant of the American Nitrogen Products Company, the cost of power at said plant, and the estimated cost of production of sodium nitrite in this country and in Norway based upon a comparison of the cost of electrical energy consumed per ton of sodium nitrite produced, and the cost of raw materials and labor entering therein. In the exhibits to said brief, relator submitted and filed with the Commission printed copies of the following: (1) an amended complaint filed in the Superior Court of the State of Washington for King County, by T. Gladding and other alleged creditors, against the American Nitrogen Products Company, praying, among other things, for the appointment of a permanent Receiver to take possession and control of the property and assets of said company, (2) a motion for intervention in said suit by certain persons describing themselves as holders of preferred stock of the said American Nitrogen Products Company, and a complaint in intervention filed by said parties, (3) an affidavit of one Christian Tjosovoig claiming to be owner of certain shares of certain preferred stock of said company, (4) an order of dismissal of said action entered in said Superior Court

on June 14, 1923, following an alleged agreement entered into by the American Nitrogen Products Company of the first part, the Nitro-Development Company of the second part, and the stockholders of the Nitro-Development Company, parties of the third part, and C. F. Graff and E. L. Blaine as parties of the fourth part, and (5) a balance sheet of the said American Nitrogen Products Company as of June 30, 1919; all of which said documents were submitted by the relator, as shown by said brief, upon the questions of the cost of the plant of said American Nitrogen Products Company, the value of its total possible output, the financial and legal status of that company "as an instrumentality for the upbuilding of the nitrite production in the United States," and the question whether there were rights vested in other parties and corporations having a fixed charge upon the American Nitrogen Products Company in the course of any development thereof "which will render expansion possible for the purpose of the upbuilding and economic production of sodium nitrite in the United States."

18. But respondents aver that neither in its said brief, nor otherwise, did the Norwegian Nitrogen Products Company at any time submit to the United States Tariff Commission, under the sanction of section 708 of Title VII of the Revenue Act of 1916, or in any other manner, any facts, information or data respecting the cost of production of sodium nitrite in the plant of its own company, or its affiliated or associated company, or principal, to wit, the Norsk Hydro-Elektrik Kvaelstofaktieselskab, which as respondents are informed and believe, and therefore aver is the sole Norwegian producer of sodium nitrite in Norway.

19. Respondents deny that the purpose of the Hearings ordered by said Commission in said investigation was to ascertain, define or determine whether or not the allegations in the application of the American Nitrogen Products Company were true in point of fact, or whether said allegations as to costs of production in the plant of said Products Company and in the United States and in said foreign countries, supported the contention or claim of said company that nitrite could not be produced in its plant or in the United States for sale in the United States, or that the differences between the cost of production of sodium nitrite in the United States and in the principal competing foreign country could not be equalized, unless the duty thereon was increased 50 per centum; or whether such allegations supported any contention or claim of the said American Nitrogen Products Company whatever. On the contrary, respondents say that the said Hearings in said Investigation were held pursuant to statute in order to give all parties interested a reasonable opportunity to be present, to offer evidence, and to be heard upon the subject matter of such investigation as instituted by the Commission for the purpose of assisting the President in the determination of the facts necessary to be ascertained for the application, in the general public interest, of section 315 of the Tariff Act of 1922.

20. Respondents deny that the allegations in the petition or application of the American Nitrogen Products Company constituted the proper or only subjects of the Hearing ordered by said Commission, or the subject of said Hearing in any sense whatsoever, or that knowledge of the allegations of said application or petition of the American Ni-

trogen Products Company as to its costs of production was or is in any manner indispensable, prerequisite and essential to the conduct of said public hearings, or any of them, or to the right of the relator to be present, to produce evidence or to be heard thereat or to present arguments upon the subject of said investigation, or to enter into or effectively to participate in any of said Hearings.

21. Respondents are unable either to admit or to deny that relator has a vital or any interest in the subject of said Investigation, or that an increase in duty from 3 cents to 4½ cents per pound, if proclaimed by the President under the law, would constitute an impediment, injury or hindrance to relator's business or would reduce relator's profit upon the sale of sodium nitrite. But respondents are advised and therefore aver that relator's allegations in that regard are irrelevant and immaterial and require no answer inasmuch as the purpose of said Investigation and of the Public Hearings held therein, is to ascertain, for the assistance of the President, and pursuant to law, the true differences between foreign and domestic costs of production, and not the supposed effect of any action predicted thereon upon the private interests of any individual.

22. Respondents further deny that relator had or has a legal right to examine and take a complete copy of the application of said American Nitrogen Products Company (which respondents again affirm was not the subject of said investigation), or of the allegations therein respecting the costs of producing sodium nitrite by said American Nitrogen Products Company; or that knowledge of such information was or is necessary

for the protection of the rights of said relator or to enable said relator to enter upon such Hearings and to offer evidence tending to disprove the allegations or claims of said American Nitrogen Products Company.

Respondents further deny that said Hearings were ordered for the benefit of, or upon the petition of the said American Nitrogen Products Company or of C. F. Graff, President and General Manager thereof, but affirm that the said Hearings were ordered as hereinbefore stated. Respondents are advised and believe and therefore aver that the filing of said petition or application by said American Nitrogen Products Company, praying for investigation of the matters therein mentioned, does not make said application of the matters therein contained a public record or in any wise constitute a waiver of lawful right to have said application, in so far as the same includes trade secrets or processes, withheld from the knowledge of the relator or of any other person, firm, copartnership or association claiming to have an interest in said investigation.

23. Answering generally relator's said petition, respondents say (*a*) that the relator, the Norwegian Nitrogen Products Company, and all parties interested in the subject matter of said investigation of the difference of costs of production of sodium nitrite, were given due, timely, and reasonable notice of the institution of such investigation and of the time and place at which the Public Hearing therein would be held; and were accorded reasonable opportunity to be present, to produce evidence, and to be heard at such Hearings; (*b*) that during the course of said Hearings as aforesaid and with reasonable

opportunity to consider and meet the same, a Report or Summary of all information and data relevant to said inquiry obtained by said Commission or in the possession of the Commission, not in the judgment of the Commission protected under said section 708 of Title VII as trade secrets or processes, was made known to the parties interested and appearing at said hearings, including relator; (*c*) that this Commission, and the Commissioners constituting the same, in the exercise of the powers or duties conferred upon them by law, are vested with power and authority to consider and determine whether information secured by said Commission in the course of an examination or an investigation is or is not in respect of said investigation a trade secret or process of the person, firm, copartnership, corporation or association supplying the same; (*d*) that their determination, in the course of and for the purposes of, any investigation conducted by the Commission, that any such information is a trade secret is final and conclusive and is not subject to be reexamined, reviewed, or set aside in this honorable Court, and more especially not by way of collateral attack or review; (*e*) that to permit such matter to be produced for reexamination and review would of itself constitute a publication and communication of the matter constituting such trade secrets and processes in violation of said statute in such case made and provided; (*f*) that the relator, having appeared and submitted to the jurisdiction of said United States Tariff Commission, and having formally requested inspection of said original and primary data collected by the Commission's investigators and the original cost and other data collected by the Commission's investigators and the original cost and

other data collected by the Commission showing the production costs of domestic manufacturers of sodium nitrite, and its motion in that behalf having been duly heard, considered and decided by said Commission, such decision made in the exercise of the quasi-judicial power and authority conferred upon it by statute, is also not to be reexamined or reviewed, or set aside in this honorable Court, and more especially not by way of collateral attack or review on a writ of mandamus; (*g*) that, inasmuch as relator submitted itself to the jurisdiction of said Commission and moved for an opportunity to cross-examine certain experts of the Commission with respect to cost data and other information obtained by them in their investigation and in the files of the Commission, and inasmuch as such motion had been overruled by the Commission, such decision is also not to be reexamined or reviewed in this Court, and more especially not by way of collateral attack.

And respondents say that for the purposes of said Investigation the determination of all said matters, involving questions of fact and of mixed law and fact, and the application of the law to the fact, has been committed to the United States Tariff Commission by the statutes in such case made and provided, and therefore can not be made the object of judicial inquiry upon a petition for a writ of mandamus or otherwise, and the determinations of said Commission are not subject to be reversed or overruled or set aside in this honorable Court, nor can said Commission be commanded to proceed or act contrary to its said determination.

24. The respondents further say that the said Investigation of the difference of costs of production of sodium nitrite in the United

States and in the principal competing foreign countries instituted for the purpose of assisting the President, is still pending in said United States Tariff Commission, undetermined and undisposed of, and that no report upon said Investigation has been transmitted to the President, nor have any recommendations respecting the same been submitted to the President. Respondents are advised, believe, and accordingly aver that relator's present proceeding is therefore premature and without warrant, inasmuch as no legal right of said relator in the premises, if any it has, has been infringed or affected and inasmuch as relator, if entitled to any remedy, has a full, plain, and adequate remedy by proceedings against the enforcement of any Presidential proclamation altering or adjusting the rates of duty on sodium nitrite after the same has been made by the President and before the expiration of the 30 days intervening between the date of such proclamation and the date when the same can be put into operation.

Respondents say that any matter or thing in said petition contained and not hereinbefore well and sufficiently admitted, traversed, confessed and avoided or denied, is not true to the best of their knowledge and belief, and the same is hereby denied.

Wherefore, having fully set forth the facts constituting the grounds and reasons for the action of the United States Tariff Commission complained of in said petition for mandamus, together with the grounds of its refusal to disclose to relator the individual costs of production and other trade secrets of the said American Nitrogen Products Company, which said petition for mandamus prays that respondents be compelled

to disclose, these respondents pray to be hence dismissed.

UNITED STATES TARIFF COMMISSION,
(Signed) By THOMAS O. MARVIN,
Chairman.
(Signed) THOMAS O. MARVIN,
Commissioner.
(Signed) WILLIAM S. CULBERTSON,
(Signed) DAVID J. LEWIS,
(Signed) EDWARD P. COSTIGAN,
(Signed) WILLIAM BURGESS,
(Signed) HENRY H. GLASSIE,
Commissioners.
(Signed) PEYTON GORDAN,
Attorney of the United States in and for the District of Columbia.
(Signed) HENRY H. GLASSIE,
(Signed) WILLIAM S. CULBERTSON,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

We, Thomas O. Marvin, William S. Culbertson, David J. Lewis, Edward P. Costigan, William Burgess, and Henry H. Glassie, being first duly sworn according to law, on oath depose and say that we have read the foregoing answer by us subscribed and know the contents thereof; and that the matters and things therein stated as of our own personal knowledge are true, and those stated as upon information and belief we believe to be true.

(Signed) THOMAS O. MARVIN.
(Signed) WILLIAM S. CULBERTSON.
(Signed) DAVID J. LEWIS.
(Signed) EDWARD P. COSTIGAN.
(Signed) WILLIAM BURGESS.
(Signed) HENRY H. GLASSIE.

Subscribed and sworn to before me this 4th day of January, A. D. 1924.

(Signed) JOHN F. BETHUNE,
[SEAL.] *Notary Public.*

APPENDIX C

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Memorandum opinion filed April 18, 1924

On submission after hearing on petitioner's demurrer to respondent's answer.

This is a proceeding for a writ of mandamus to be issued against the respondents requiring them to permit the relator to—

> Examine the petition of the American Nitrogen Products Company and all data, information, and evidentiary matter on file with the Commission respecting the cost of producing sodium nitrite at the plant of said American Nitrogen Products Company or elsewhere in the United States, and in foreign countries, and to show cause, if any they have, why a public hearing should not be granted, at which the said relator and any other person, firm or corporation having an interest in the subject-matter, appearing therein shall have the right and opportunity to cross-examine investigators, experts, agents and witnesses who may have supplied any such data, information or evidentiary matter, to offer evidence in contravention of any such data, information and evidentiary matter, to be heard thereupon and to present arguments and representations against said petition, the allegations therein contained, and any conclusions which may be made therefrom, and against the probative and legal value of any and all data, information and evidentiary matter relating to the sub-

ject of said hearings on file with the Commission, upon which the said American Nitrogen Products Company prays that said Commissioners, respondents herein, recommend to the President that the duty of three (3) cents per pound on the importation of sodium nitrite, as presently fixed by law, be increased to four and one-half ($4\frac{1}{2}$) cents per pound, under the provisions of the Tariff Act of 1922.

From the pleadings it appears that the relator is a corporation organized and existing under the laws of the State of New York, engaged in the business of importing sodium nitrite for sale within the United States, but according to the respondents' answer, upon information and belief in this respect, the relator is not in the general business of importing sodium nitrite as such, but is the exclusive agent, selling on commission, of a certain Norwegian corporation engaged in the business of manufacturing and producing sodium nitrite for exportation to and sale within the United States, and in the proceeding before the respondent Commission hereinafter referred to, the relator was and is acting for and on behalf of such Norwegian manufacturer.

The importance of the case was asserted by counsel for the respective parties in the arguments at the bar. The exhaustive character of those arguments, the ability with which they were made, and the case itself, would warrant this court in fully setting forth the grounds and reasons for the conclusion reached, but the importance to both the relator and the respondents of an early disposition of the litigation, at least so far as this court is concerned, and the exactions of manifold judicial

duties pressing upon the court, necessitate a comparatively brief statement of the reasons for its conclusion.

The controversy presented by this proceeding arises out of an investigation undertaken by the respondent Commission, of the differences of costs of production and of other facts and conditions enumerated in Section 315 of title 3 of the Tariff Act of 1922, with respect to sodium nitrite, wholly or in part the growth or product of the United States, and of and with respect to this substance, wholly or in part the growth or product of competing countries. The investigation was stimulated or suggested by a petition filed on October 24, 1922, by the American Nitrogen Products Company of Seattle, Washington, in which it sought an increase of the duty upon imported sodium nitrite from three cents per pound, as prescribed by the Tariff Act of 1922, to 4½ cents per pound. On July 20, 1923, the respondent Commission by an order adopted as of that date, gave notice of a public hearing, to be held on September 10, 1923,

> at which all persons interested will be given an opportunity to be present to produce evidence, and to be heard with regard to the differences in cost of production, etc.,

of sodium nitrite.

Before the date of the hearing so fixed by the respondent Commission, the relator herein, by its counsel, appeared in the proceeding or investigation thus instituted by the Commission, and requested a copy of the petition filed by the American Nitrogen Products Company. This was furnished, with certain deletions made by the Commission, and at the public hearing so ordered, and after it had

begun, the questions raised by the pleadings in the pending case, were presented, and the respondent Commission ruled on them at an adjournment of the hearing, the adjourned hearing taking place on October 6, 1923. These rulings appear on pages 66 et seq. of the printed petition herein. From an inspection of these rulings it will be observed that the Commission refused the application made by the petitioner for leave to its counsel to inspect certain data collected by the Commission, as well as certain data submitted to the Commission by the American Nitrogen Products Company, and the data thus furnished is the data that the relator seeks to obtain access to by the writ of mandamus.

It is to be noted in passing that a domestic manufacturer is seeking to obtain an increase in the tariff duty on sodium nitrite, and the relator is an American corporation engaged in the business of *importing* this product for sale within the United States. It is therefore engaged in competing, in the United States, with domestic manufacturers of the same product.

The respondent Commission was created by the Revenue Act of September 8, 1916, and its principal duties are set forth in sections 702–703, and 704 of the said Act. By Section 702 it is provided that it shall be the duty of the Commission

> to investigate the administration and fiscal and industrial effects of the customs laws of this country now in force or which may be hereafter enacted, the relations between the rates of duty on raw materials and finished or partly finished products, the effects of ad valorem and specific duties and of compound specific and ad valorem duties, all questions relative to the arrangement of schedules and classification of articles in the several sched-

> ules of the customs law, and, in general, to investigate the operation of customs laws, including their relation to the Federal revenues, their effect upon the industries and labor of the country, and to submit reports of its investigations as hereafter provided.

By section 703 it is, *inter alia,* provided

> That the commission shall put at the disposal of the President of the United States, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, whenever requested, all information at its command, and shall make such investigations and reports as may be requested by the President or by either of said committees or by either branch of the Congress.

By the Tariff Act of September 21, 1922, and by subsection (*a*) of Section 315 thereof it was enacted

> That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in cost of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same.

and by subsection "c" of said Section 315, it is prescribed, *inter alia*,

> That in ascertaining the *differences in costs* of production, under the provisions of subdivisions (*a*) and (*b*) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.
>
> Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made.
>
> The commission shall give reasonable public notice of its hearings and *shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.*
>
> The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary. (Italics ours.)

While there are other provisions of law that it would be useful to quote, and which must be considered in the disposition of the case, neither time

nor space permits this to be done. For present purposes it is enough to point out that the Tariff Commission is exclusively an investigating and fact-finding body, the results of whose investigations are primarily intended for the information and use of the President, Committees of Congress, and of Congress itself, and particularly, in carrying out the policy of Congress as it finds expression in the Tariff Act of September 21, 1922, it is an aid to the President in securing information that he should possess in order to exercise the important power and authority, somewhat legislative in its character, conferred upon him by section 315 of the Tariff Act last mentioned. And, while it is true that it is on occasions required to hold public hearings, to give parties interested a right to be heard, and to present evidence relating to the subject matter of its investigations, it is a serious question whether these requirements of the statute change, or are intended to change the essential character of the Commission as an investigating and fact-finding body, and while parties interested are by terms of the applicable statutes entitled to be heard and to present evidence, it would, it seems, be going too far to say that interested parties appearing in such investigations, and whose interests may conflict on questions as to whether a given tariff duty should be increased or reduced, stand in the position of litigating parties, entitled to invoke Constitutional rights and safeguards applicable wherever it can be said that a question of due process of law is involved. Of course domestic manufacturers of products who encounter the competition in the United States of foreign manufacturers, their agents and representatives in this country, and

citizens of the United States engaged in the business of importing and selling within the United States, the same product, are interested parties, with respect to Tariff duties laid thereon, but neither have any property right, in the usual sense of that term, in an existing tariff duty, with reference to which they are at all times subject to the will of Congress, who may prescribe a duty, modify a duty already prescribed, or remove it altogether and thereby place such product on what is sometimes called the free list. *Bragg* v. *U. S.*, 2 Court of Customs Appeals, 22, 23, 24. *Buttfield* v. *Stranahan*, 192 U. S. 470, 492, 493.

The respondents resisted the demands of the relator in this case, upon the main grounds that to afford the relator access to the data demanded by them, would be to violate assurances given by them to those who supplied them with confidential information regarding their business, and would also reveal trade secrets.

The protection of trade secrets or processes has been something that the Courts of the country have generally safeguarded, and have enjoined those who would reveal them. So late as February 18th of this year, the Supreme Court, through Mr. Justice Holmes, delivered an opinion in the case of *United States ex rel Saint Louis Southwestern Railroad Co.* v. *The Interstate Commerce Commission, et al.*, No. 398, October term, 1923. In that case it appeared that the Interstate Commerce Commission had made a tentative valuation of the relator's property and had served it with a copy of the valuation. The relator protested the valuation, and thereupon the Commission ordered a hearing upon the subject. Before the hearing took

place the relator filed a motion with the Commission praying for an order

> allowing it to examine the underlying data upon which the valuation was based and for a subpœna duces tecum to named officers of the Commission directing them to bring with them to the hearing all the data in any way relating to the matter in issue.

The Commission thereupon canceled the hearing and made an order in which, *inter alia,* it denied inspection of "cost information secured from others than the carrier in question." Thereupon the relator presented its petition for a writ of mandamus to this Court, which petition was dismissed, and the case finally reached the Supreme Court. In the course of its opinion that Court declared that

> if Congress had given no hearing before the Commission but still had made its conclusions *prima facie* evidence of value, it would be hard to say that any Constitutional rights of the railroads had been infringed.

The Court considered the statute under which the Interstate Commerce Commission was acting, and referring to provisions of the statute prescribing a hearing before the Commission, declared that

> the hearing to be sure is not of the ordinary kind. The railroads have no adversary. The Commission of course has no object except to arrive at the truth. It is not to be cross-examined for bias or otherwise as to its capacity to decide or modes of deciding what is entrusted to it, but on the other hand since it must grant a hearing manifest justice requires that the railroads should know the facts that the Commission supposes to be established and we presume that it would desire the grounds of its tentative valuation

> to be subjected to searching tests. But there are necessary limits. While there can be no public policy or relation of confidence that should prevail against the paramount claim of the roads the work of the Commission must go on, and can not be stopped as it would be if many of the railroads concerned undertook an examination of all of its papers to see what they could find out.

It is to be observed that this case involved property of the relator railroad, a valuation of which, when made final, would be *prima facie* evidence in various judicial proceedings in which the value of the property is material to the disposition of the case.

In the instant case the investigation undertaken by the Tariff Commission, is for the purpose of providing the President with information which would aid him in determining whether an existing Tariff duty should be altered.

In two later cases, decided together on March 17, 1924, those of the *Federal Trade Commission* v. *The American Tobacco Company,* and the same *Commission* v. *P. Lorillard Company, Incorporated,* Nos. 206 and 207, October term, 1923, the Supreme Court had before it petitions for writ of mandamus brought by the Federal Trade Commission against the defendants in order to require them to produce certain records, contracts, memoranda, and correspondence for inspection and making copies. The petitions were denied by the District Court and in the course of its opinion, also delivered by Mr. Justice Holmes, the Court declared:

> Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to

> authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the *possible revelation of trade secrets*, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335. (Italics ours.)

It is noted that in these cases the situation was rather the reverse of what is presented in the case at bar. There the Federal Trade Commission was desiring to secure access to the records of the companies engaged in the manufacture and sale of tobacco, and the Commission proceeded, as it conceived it had a right to proceed, under the Act of September 26, 1914, and in pursuance of a resolution of the Senate passed August 29, 1921, the resolution directing the Commission to investigate the tobacco situation as to domestic and export trade with particular reference to market prices to producers, and the Act under which it proceeded, directs the Commission to prevent the use of unfair

methods of competition in commerce and authorizes it, and in a proper case, to order desistence of the use of prohibitive methods. In the instant case we have the Tariff Commission obtaining information and data in confidence, and which information and data involves, it is claimed by respondent Commission, trade secrets, if not trade processes, as well, and the Commission is doing this for the purpose of supplying the President with information upon which he might act in altering a tariff duty.

It is not asserted that the cases thus referred to are decisive of the pending one, but they certainly point to underlying principles which have their application here, and perhaps for even stronger reasons than those involved in the first case cited.

The relator claims in the broadest form, the right, which it insists is given to it by the law under which the respondent Commission operates, to have an opportunity to examine

> every particle of evidence gathered by the Commission or its representatives,

and to offer evidence in contradiction thereof

> before judgment of the Commission is rendered thereupon.

It further contends that the evidence to which it demands access contains no trade secrets, within the legal meaning of the term.

Attention has already been called to the evident fact that there is a struggle on between at least one domestic manufacturer of sodium nitrite and the relator, who claims to be engaged in the importation and sale within the United States of the same article of commerce made abroad, over a tariff duty. But the pleadings, in the opinion of the Court, re-

veal that the relator is really acting as a selling agent for at least one foreign manufacturer of the product mentioned. Not only is this the information that the respondent Commission has on the subject, but on pages 55 and 56 of the relator's printed petition it appears that during the hearings before the Commission, counsel for the relator informed the Commission that "we cabled Norway as follows", and then the cable is given, this cable informing "Norway" of the result of the work of the Commission's investigators abroad as to "your cost production," etc. And he also read into the record of the hearing the reply to the cable, which reply contains, among other things, the following:

> On principle, we always refuse publish cost price consequently did not furnish investigators any information enabling them calculate cost price.

Among the data that the relator demanded access to from the respondent Commission and now asks this Court, by its writ of mandamus, to compel the Commission to permit is

> the cost of producing sodium nitrite at the plant of said American Nitrogen Products Company or elsewhere in the United States, and in foreign countries.

Thus it appears that in an investigation undertaken by the respondent Commission to ascertain, among other things,

> the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries. (Subsections *a* and *b*, Sect. 315, Tariff Act of September 21, 1922),

we find the relator, on behalf of one or more foreign manufacturers of sodium nitrite, demanding access to data confidentially supplied to the Commission by domestic manufacturers, although its principal or principals have, "on principle," refused to supply the Commission, even in confidence, with the same sort of information. Considering the nature and purpose of the Commission's investigation, this attitude of the relator's principal or principals is not encouraging. It is true that neither the relator nor its principal or principals make any concealment of their attitude in this respect, but stand upon what they claim is their legal right, given, to them, they insist, by applicable and controlling statutes. In the opinion of the Court, it must be very clear that the Congress intended by its enactments to accord such rights, where the assertion of them under the facts of this case, produces the incongruous situation that has been pointed out. Indeed, if the relator is right in its contentions, it would seem as if the purposes of the Congress could be defeated by the attitude assumed in this case by the relator and its principal or principals, and this, too, at the expense of the domestic manufacturer and to the advantage of the foreign manufacturer, a state of affairs that it is almost inconceivable to think that Congress could have intended, when the policy of revenue measures designed to give legal effect to the principles of so-called protective tariff legislation is considered.

Something should be said on the contention made by the relator that its demand does not call for the disclosure of trade secrets. In this regard we find the respondent Commission and the American Nitrogen Products Company declaring that certain of the information, access to which is de-

manded by the relator, *is* information concerning the latter's trade secrets and those of other companies likewise engaged in manufacturing sodium nitrite.

Section 708 of the Tariff Act of September 8, 1916, makes it unlawful for any member of the United States Tariff Commission or for any of its employees

> to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any firm, copartnership, or association embraced in any examination or investigation conducted by said commission, or by order of said commission, or by order of any member thereof,

and it penalizes a violation of the section by fine or imprisonment or both. On behalf of the Commission it is insisted that the information and data, access to which it denied the relator, consists of trade secrets. The relator of course insists that it does not.

The information and data thus furnished consists in part, at least, of the original cost and other data collected in the field by the Commission's investigators, the figures showing the details of individual costs of production obtained by the Commission under the sanction of Section 708 of the Tariff Act of September 8, 1916, and original data showing the production costs in respect of labor of the American Nitrogen Products Company submitted by or obtained from the said company under the section mentioned. Also original data relating to the production costs of the said Products Company, similarly submitted or obtained from it. The Commission also denied to the relator permis-

sion to cross examine its experts with respect to the cost data and other matter obtained by them in the course of their investigations in the field.

In the main, the relator insists for a construction of the words "trade secrets" as would confine their use to secret formulas or processes not patented and used in compounding some article of commerce or trade, and there are not wanting decisions which, at least, incline so to confine or limit the applications of the phrase, but the weight of modern judicial authority, in the opinion of this Court, is against so narrow a construction. It seems to the Court that the cost of production of manufactured articles may vary in the proportion to the skill and acumen of individual manufacturers. To illustrate, it is altogether supposable that a given manufacturer or manufacturing concern may so organize his or its production processes as to bring about the greatest efficiency of results as a cost below that which another manufacturer or manufacturing concern of like size and engaged in producing the same article or articles of trade as the former, would be able to do. They are competitors, but the manufacturer whose greatest skill and acumen has lowered the cost of production over that of his adversary has an advantage over the latter which, in fairness, it may be said he has justly earned. Is it the right of the less skillful manufacturer to possess himself by a compelled disclosure of the methods and processes of the more efficient competitor, and thus impair the advantage of the latter in the competitive struggle? It is conceivable that the abler manufacturer may have accomplished his superior position in part by wages, hours, and conditions of labor, and by reducing his

labor turnover. These factors he may be successful in concealing from his competitors, and why may not these methods of his under such circumstances, be justly regarded as "trade secrets"? Of course, in these days of labor union rates of wages, hours, and conditions of labor, this may be an increasingly difficult thing for a manufacturing employer to accomplish, but so long as he is able to do so, is it unjust that the methods he employs be withheld from the knowledge of his competitors? Furthermore the superior ability of one manufacturer over another engaged in the same line of manufacture, which results in a lower cost of production for the former increases the good will of his business, and this good will is a property right which the law will protect and it enters very largely into the price he will receive in a sale of his manufacturing enterprise. Some of the views thus expressed are illustrated in such cases as *The International News Service* v. *Associated Press,* 248 U. S. 215–236, *Board of Trade* v. *Christie Grain and Stock Company,* 198 U. S. 236–250, *Witkop* v. *Boyce,* 61 Misc. 126, 12 N. Y. Sup. 1847, *Crocker-Wheeler Co.* v. *Bullock,* 134 Fed. 241–242–256, and *U. S.* v. *Basic Products Co.,* 260 Fed. 472–482.

More might be written on this interesting subject but the Court at the outset of this memorandum stated that it would undertake to state only *some* of the reasons which has led it to the conclusion that relator's demurrer to the answer of the respondent must be overruled.

And it is so ordered.

F. L. Siddons,
Justice.

April 18th, 1924.

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